

Post-Crisis AG Enforcement Is Just The Beginning

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A decade after we saw the first signs of the credit crisis in 2007, the financial industry continues to grapple with the regulatory reforms, litigation and enforcement actions that have followed. This Expert Analysis series explores the crisis' profound impact and where we stand today.

UDAAP — the prohibition against unfair, deceptive or abusive acts or practices — is now ubiquitous in government enforcement actions, due in large part to the Consumer Financial Protection Bureau's expansive authority under the Dodd-Frank Act.[1] Yet, as the CFPB has reshaped much of the financial regulatory landscape, it has had an eager and willing partner in state attorneys general offices, each of which has its own independent UDAP authority. This double whammy of UDAAP-UDAP enforcement, from not just one federal regulator, but from a collection of state AGs across the country, is a major part of the post-financial crisis focus on consumer protection. As the financial services industry awaits news of the future of the CFPB, the states already are ramping up their efforts to ensure they are ready to fill any void left by potential reform at the CFPB.

UDAAP and UDAP

Every state in the country has had its own consumer protection laws long before the CFPB ever existed, rooted primarily in established case law under Section 5 of the Federal Trade Commission Act.[2] While those laws generally lack the abusiveness standard added by the CFPB, they pack much the same punch: although something may be perfectly legal under statutory law, it may still be a UDAP violation.

The states have a well-established history of coordinating with federal regulators to extend the reach and impact of their enforcement activity. Perhaps the best example of post-financial crisis AG enforcement, and the states' ability to coordinate with each other and federal authorities, is the joint federal-state national mortgage servicing settlement.[3] That 2012 settlement between the federal government, 49 states and the nation's five largest mortgage servicers sought to provide a series of protections to and financial recompense for borrowers whose loans were allegedly the byproduct of



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questionable origination, servicing and foreclosure practices.

Since that time, and with the creation of the CFPB, the states have only increased these efforts. State AGs have worked with the CFPB, other federal agencies and each other under their collective UDAAP-UDAP authority to take on issues either deemed to be the direct fallout of the financial crisis, or to have resulted from the perceived lax federal regulation that led to it. These issues include continued efforts to combat alleged predatory lending, mortgage servicing and debt collection violations. Emboldened also by the aggressive tactics of the CFPB, the AGs have set their sights on broader issues than traditional housing concerns, taking aim at an array of consumer protection issues in any given household financial portfolio, from payday and auto lending, to credit card practices and student loan servicing. Indeed, the AGs have pursued conduct new to the debate of what constitutes financial services, ranging from the wireless phone industry to for-profit colleges.

However, unlike the CFPB, the jurisdiction of which is limited to certain enumerated federal laws and covered entities, the AGs have assumed a wider reach. Health care, manufacturing and privacy protections, for example, are all areas subject to AG review and UDAP enforcement. Thus, the state AGs can be more agile when mobilizing around any number of issues that draw their attention. These issues may also be wider-ranging because state AGs are popularly elected in the overwhelming majority of states and U.S. territories. As a result, they set much of their own agendas and are often motivated politically by the governing parties of their state. Thus, the focus of an AG's office is rarely narrow or constant, but can change quickly as issues develop with consumers or in the media. Indeed, state AGs are as prepared to take on issues driven by consumer complaints or negative press as any enforcement agency.

The Future of AG Enforcement

The AGs remain poised to not only expand their reach in the consumer protection space at a state-law level, but also at a federal level should the enforcement authority at the CFPB be restricted, as some predict may happen. In advance of that possible outcome, a number of states already are taking steps to increase their consumer protection efforts in the financial services space. Some, like Pennsylvania and Maryland, have announced the creation of special offices dedicated to consumer protection issues.[4] Others, like New York, Massachusetts and California, have unequivocally stated that they stand ready to fill any void left by a weakening of the CFPB. In any case, the AGs are well-positioned to take on these issues for several reasons.

First, despite being the chief law enforcement officers for their state, AGs can, in certain circumstances, enforce federal laws. Dodd-Frank specifically grants state AGs the authority to bring a civil action to enforce certain provisions of the act, including its UDAAP prohibition.[5] Indeed, several states have already relied on this provision to bring suits against financial services providers. In addition, many federal consumer financial laws expressly grant state AGs enforcement authority, affording those states a bigger toolbox to challenge perceived misconduct.[6] These measures expand the states' reach and provide the ability to leverage the larger fines of a federal statute.

Second, there still remains the tried-and-true method of cooperation. One challenge with state AG enforcement is that, absent cooperation or federal intervention, citizens of one state may receive relief others do not. However, with increasing frequency, states are partnering with each other to conduct parallel investigations through a collection of aligned states, or even joint investigations led by any one state or number of states through a committee process. This has a broader reach more akin to a federal action, but also the ability to combine more limited state resources to put greater pressure on an

enforcement target. After all, it's one thing to find yourself in the crosshairs of a single federal agency with a seemingly unlimited arsenal of resources, but being in the sights of a collection of separate but coordinated states can be equally, if not more, challenging for institutions.

How to Prepare Now

We expect this trend to continue, with AGs eagerly pursuing consumer protection issues in financial services and beyond. That being the case, the past actions of the AGs reveal that there are things that companies can do now to prepare. First, do not let the first time you make contact with your state AG's office be because you are responding to a subpoena. Rather, seek out opportunities to introduce yourself to and educate the AG staff about what you do. A cooperative relationship can be beneficial to both parties and provide opportunities for communication to address concerns on both sides, before a problem arises.

Second, now is not the time to back off of compliance efforts. Even in the unlikely event that the CFPB disappears tomorrow, for the reasons discussed above, the states stand ready to step into its shoes on enforcement. Moreover, the lifecycle of an enforcement matter is long, and nobody can predict what a state or federal agency will be reviewing in the years to come. Stay the course on what you have put in place post-financial crisis, as those who do not will be low-hanging fruit for the next round of enforcement.

Finally, monitor activities of interest in your industry and your state. If you are aware of areas of concern in the media or increased consumer complaints, you can assume that your AG is too. Proactive efforts to identify and address potential issues before an investigation begins is meaningful from a risk mitigation standpoint, but also a best practice from a customer service perspective.

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[1] See Dodd-Frank Wall Street Reform and Consumer Protection Act, §§ 1002, 1031 & 1036, codified at 12 U.S.C. §§ 5481, 5531 & 5536(a) ("Dodd-Frank Act").

[2] See Federal Trade Commission Act, codified at 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce ... are ... declared unlawful.").

[3] See DOJ Press Release, \$25 Billion Mortgage Servicing Agreement Filed In Federal Court, at <https://d9klfgibkcquc.cloudfront.net/Settlement-USDOJ-FILING-news-release.pdf> (March 12, 2012) ("The Justice Department, the Department of Housing and Urban Development (HUD) and 49 state attorneys general announced today the filing of their landmark \$25 billion agreement with the nation's five largest mortgage servicers to address mortgage loan servicing and foreclosure abuses.").

[4] See PA AG Press Release, "Attorney General Josh Shapiro Announces Consumer Financial Protection Unit" (July 20, 2017),

at https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=3757; Formation of Maryland Financial Consumer Protection Commission (June 2017), at <http://msa.maryland.gov/msa/mdmanual/26excom/html/14financialcons.html> (discussing the creation of the commission for the purpose of “assess[ing] the impact of potential changes to federal financial industry laws, regulations, budgets, and policies”) (last visited Sept. 14, 2017).

[5] See Dodd-Frank § 1042, 12 U.S.C. § 5552(a)(1).

[6] See, e.g., 15 U.S.C. § 1640(TILA); 15 U.S.C. § 1681s (FCRA), and 12 U.S.C. § 2607 (RESPA Section 8) (granting enforcement authority to state AG).